Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-17

THE FIRST NATIONAL BANK OF CHICAGO,

Petitioner,

vs.

STATE OF ILLINOIS ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM J. SCOTT,
Attorney General of Illinois,

JEROME WEBB,
Assistant Attorney General,

Attorneys for Respondent.

160 North LaSalle Street,
Chicago, Illinois 60601,
(312) 793-3587.

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Pursuant to Supreme Court Rule 24(5), the State of Illinois submits this supplemental brief in opposition to the petition for a writ of certiorari filed by the First National Bank of Chicago* in order to apprise this Court

* This supplemental brief applies also to the companion case before this Court also on petition for a writ of certiorari, *Continental Illinois National Bank and Trust Company v. State of Illinois ex rel. Richard K. Lignoul, Commissioner of Banks and Trust Companies* (No. 75-1900)

of the opinions in the following two cases which deal with the same subject matter as the decision of the Seventh Circuit sought to be reviewed here: *State of Missouri, ex rel. W. R. Kostman, Commissioner of Finance v. First National Bank in St. Louis*, 76-1056 (8th Cir., July 20, 1976); *State of Colorado ex rel. State Banking Board v. First National Bank of Fort Collins*, 75-1523, 75-1611, 75-1612 (10th Cir., August 20, 1976) copies of which are appended as Appendix A and B.

Furthermore, at page four of its petition, First National Bank alludes to a City of Chicago Ordinance which permitted "banks located in Chicago to establish and operate an unlimited number of CBCT's in Chicago." On August 19, 1976, the Honorable Raymond Berg of the Circuit Court, Cook County, Illinois entered an order declaring that ordinance unconstitutional as permitting branch banking under Illinois law and thus contrary to Article 13, Section 8 of the Illinois Constitution. A copy of that order is appended as Appendix C. That order is now on appeal to the Illinois Supreme Court.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of Illinois,

JEROME WEBB,
Assistant Attorney General,

Attorneys for Respondent.

160 North LaSalle Street,
Chicago, Illinois 60601,
(312) 793-3587.

APPENDIX A

United States Court of Appeals
For The Eighth Circuit

No. 76-1056

STATE OF MISSOURI, ex rel. W. R. KOSTMAN, Commissioner of Finance,

Plaintiff-Appellee,

v.

FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

SUBMITTED: May 14, 1976 — FILED: July 20, 1976

Before HEANEY and HENLEY, *Circuit Judges*, and SCHATZ, *District Judge.**

PER CURIAM.

The First National Bank in St. Louis appeals from the decision of the District Court finding that the Bank's operation of customer-bank communication terminals (CBCTs) constituted the operation of branch banking within the meaning of 12 U.S.C. § 36(f). The District Court found that this conclusion mandated the further finding that the Bank maintained more than two branch banks and was, therefore, in violation of 12 U.S.C.

* ALBERT G. SCHATZ, District Judge, District of Nebraska, sitting by designation.

§ 36(c). The District Court enjoined the appellant from operating the CBCTs in question or the utilization of any similar machines. The court later, however, suspended the permanent injunction pending appeal. We affirm the findings of the District Court.

12 U.S.C. § 36(f) provides:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

12 U.S.C. § 36(c) provides that a national bank may establish, with the approval of the Comptroller of the Currency, branch banks within a state provided that state banks are also permitted by state statute to establish and maintain similar type and number of branch bank facilities. The case law clearly establishes that national banks are limited in this manner in order to provide for "competitive equality" in branch banking. *First National Bank v. Dickinson*, 396 U.S. 122, 133 (1969); *First National Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966); *Nebraskans for Ind. Banking v. Omaha Nat. Bank*, 530 F.2d 755, 760 (8th Cir.) (en banc), *vacated and remanded on other grounds*, 44 U.S.L.W. 3698 (U.S. June 10, 1976) (No. 75-1382); *Driscoll v. Northwestern National Bank of St. Paul*, 484 F.2d 173, 175 (8th Cir. 1973). Section 362.107 R.S. Mo. (1969), provides that state banks may operate only two facilities in addition to the main banking office, upon approval of the State Financial Commissioner.

The stipulated facts show that the First National Bank in St. Louis is a national banking association having its principal place of business at Broadway and Locust Streets in the City of St. Louis, Missouri. The Bank also conducts business at two additional separate facilities in the City of St. Louis. On December 18, 1974, the Bank placed in operation two Douctel Total Teller machines (CBCTs) at locations separate and apart from the other offices of the Bank.

It is further stipulated that these machines have the capacity to receive deposits, to transfer funds between different kinds of accounts within the parent banking facility, to accept payments on obligations to the Bank by either deposit or transfer and to provide cash in prepackaged amounts of $25, $50, $75 and $100 to a customer of the bank properly operating these machines.

The definition of branch banking in 12 U.S.C. § 36(f) is in the disjunctive. The offering of any of the services listed therein, receiving deposits, paying checks or lending money, when performed at a location "apart from the chartered premises," provides a basis for concluding that branch banking is taking place. *Nebraskans for Ind. Banking v. Omaha Nat. Bank, supra* at 759.

Our review of this record discloses that the machines in question are capable of receiving deposits and crediting the amount deposited to the customer's account. The ability of the CBCT machine, when properly operated, to perform this banking transaction at a location "apart from the chartered facility" constitutes branch banking. *Independent Bankers Association of America v. James E. Smith, Comptroller of the Currency of the United States*, No. 75-1786, slip op. at 35-43 (D.C. Cir. March 23, 1976). *See also State of Illinois ex rel. Richard K. Lignoul, etc. v. Continental Illinois National Bank and Trust Company of Chicago*, Nos. 76-1083, 76-1084 (7th Cir. May 27, 1976).[1] As the First National Bank of St. Louis already performs banking functions at three separate locations, the installation and use of the CBCT machines at two other locations constitutes a violation of 12 U.S.C. § 36(c).

We affirm the decision of the District Court and order the permanent injunction reinstated.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[1] Because 12 U.S.C. § 36(f) is in the disjunctive and we find that the CBCT machines can accept deposits, we do not need to consider whether these machines can also cash checks or lend money within the meaning of 12 U.S.C. § 36(f).

APPENDIX B

PUBLISH

United States Court Of Appeals

Tenth Circuit

Nos. 75-1523, 75-1611, 75-1612

STATE OF COLORADO, ex rel., STATE BANKING BOARD, and HARRY BLOOM, STATE BANK COMMISSIONER and CHAIRMAN, STATE BANKING BOARD,

Plaintiffs-Appellants and Cross-Appellees,

v.

FIRST NATIONAL BANK OF FORT COLLINS, and JAMES E. SMITH, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES,

Defendants-Appellees and Cross-Appellants.

and

THE CONFERENCE OF STATE BANK SUPERVISORS AS AMICUS CURIAE

Appeal from the United States District Court
for the District of Colorado
(D.C. Civ.A. 75-M-397)

Mary J. Mullarkey, First Assistant Attorney General (J.D. MacFarlane, Attorney General, Jean E. Dubofsky, Deputy Attorney General, and Edward G. Donovan, Solicitor General, on the brief), for Plaintiffs-Appellants and Cross-Appellees.

William H. Brown for First National Bank of Fort Collins and Michael Kimmel, Department of Justice, for James E. Smith, Comptroller of the Currency (Ward H. Fischer, Fischer, Brown, Huddleson & Gunn, for First National Bank of Fort Collins, and Rex E. Lee, Assistant Attorney General, James L. Treece, United States Attorney, Ronald R. Glancz, Department of Justice, and C. Westbrook Murphy and Edward Jiran, of Counsel, for the Comptroller of the Currency, on the brief), for Defendants-Appellees and Cross-Appellants.

James F. Bell (Peter B. Work, Jones, Day, Reavis & Pogue, on the brief), for the Conference of State Bank Supervisors, as Amicus Curiae.

Before BREITENSTEIN, MCWILLIAMS, and DOYLE, Circuit Judges.

MCWILLIAMS, Circuit Judge.

This appeal concerns the efforts of the First National Bank of Fort Collins, Colorado to install an electronic banking facility, commonly known as a customer-bank communications terminal (CBCT), in a regional shopping center situate approximately two miles from its main bank building located in downtown Fort Collins. This CBCT permits the Bank's customers, through the use of a coded card, to transact any of the following: (1) deposit funds to the customer's account by placing checks or currency in an envelope and inserting the envelope into a slot in the face of the machine, tapping out the amount of the deposit on the face of the machine and pressing a button to indicate whether the deposit is to be credited to a checking or savings account; (2) withdrawing a prepackaged packet of either $25 or $50 in currency from the machine and debiting such withdrawal to either the customer's checking or savings

account, or charging it to a Master Charge Account or a Balance Plus Account; or (3) transferring funds from the customer's savings account to his checking account, or vice versa. See the trial court's memorandum opinion and order for a detailed statement as to the manner in which a CBCT functions. Colorado *ex rel.* State Bank Board v. First National Bank, 394 F.Supp. 979 (D. Colo. 1975).

The first National Bank of Fort Collins, hereinafter called the Bank, is a national bank. On December 12, 1974, the Comptroller of Currency issued an interpretative ruling which allowed national banks to make available to their customers one or more CBCT's. In his ruling the Comptroller declared that the use of such devices at locations other than the main office did not constitute branch banking. Acting pursuant to the ruling of the Comptroller, the Bank, as above indicated, installed a CBCT in a shopping center two miles away from its offices in downtown Fort Collins.

The State of Colorado expressly prohibits branch banking, with the exception that, subject to certain conditions, a bank may maintain one detached facility within 3,000 feet of its premises. C.R.S. 1973, 11-6-101(1). The State of Colorado, acting through the State Board of Banking, determined, to its satisfaction, that the CBCT installed and operated by the Bank in the shopping center two miles removed from its main office was a branch bank and prohibited under both federal and state law.

It was in this general setting that the State of Colorado, *ex rel.* State Banking Board, brought the present proceeding against both the Bank and the Comptroller. The gravamen of the complaint was that the Bank was engaging in branch banking in violation of federal and state law and sought declaratory judgment and permanent injunction. A hearing on a preliminary injunction was by agreement treated as the hearing on permanent injunction.

The trial court concluded that the use of the Bank's CBCT for receiving deposits constituted branch banking in violation of 12 U.S.C. § 36, but that the other functions of the CBCT did not constitute branch banking and were valid under the Comptroller's interpretative ruling. Upon the Bank's assurances that it would follow the trial court's declaratory judgment without the necessity for an injunction, the trial court granted no injunctive relief.

The State Banking Board now appeals the judgment of the trial court that the withdrawal of money and the transfer of funds from a savings account to a checking account through the use of the CBCT does not constitute branch banking. The Bank and the Comptroller by cross-appeal challenge that part of the trial court's judgment which declared that the receipt of deposits by the CBCT violated the federal statute regarding branch banking.

The Comptroller, but not the Bank, challenges the standing of the plaintiffs to maintain the present proceeding. The trial court concluded that the plaintiffs did have standing to seek declaratory judgment, citing United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); and Jackson v. First National Bank of Valdosta, 349 F.2d 71 (5th Cir. 1965). We agree that these plaintiffs have standing.

We also agree with the conclusion of the trial court that the off-premises CBCT, insofar as it receives deposits, constitutes branch banking in violation of 12 U.S.C. § 36. In this regard we, like the trial court, find the instant case to be controlled by First National Bank in Plant City v. Dickinson, 396 U.S. 122 (1969). In accord, *see* Independent Bankers Association v. Smith, 534 F.2d 921 (D.C. Cir. 1976); Illinois *ex rel.* Lignoul v. Continental Illinois National Bank and Trust Co., No. 75 C-2027 (7th Cir., May 27, 1976), *petition for cert. filed*, 45 U.S.L.W. 3005 (U.S. June 30, 1976) (No. 75-1900); and Missouri *ex rel.* Kostman v. First National Bank, No. 76-1056 (8th Cir., July 20, 1976).

As indicated, the trial court additionally concluded that as concerns withdrawals and transfers, the Bank's off-premises CBCT was not acting as a branch bank, and that such did not offend 12 U.S.C. § 36. With this conclusion we are not in accord.

Since the trial court entered its judgment in the instant case, two Circuits have considered this precise matter, i.e., whether the withdrawal of funds from either a checking account or a savings account, or the transfer of funds from one to the other, through the use of an off-premises CBCT is in violation of the federal rule on branch banking. Both Circuits held that such is in violation of 12 U.S.C. § 36. We agree with the result reached by those Circuits. We feel no need to here elaborate on the matter. It is sufficient to say that we subscribe to Independent Bankers Association v. Smith, 534 F.2d 921 (D.C. Cir. 1976) and Illinois *ex rel.* Lignoul v. Continental Illinois National Bank and Trust Co., No. 75 C-2027 (7th Cir., May 27, 1976), *petition for cert. filed*, 45 U.S.L.W. 3005 (U.S. June 30, 1976) (No. 75-1900).

The reasoning of the trial court in the instant case was that the *manner* in which Bank's CBCT permitted the withdrawal of prepackaged packets of money, with a corresponding debit to the customer's checking or savings account, and also permitted the transfer of funds from one account to another, did not constitute "checks paid" or "money lent" as those terms are used in 12 U.S.C. § 36(f). Such reasoning in our view unduly emphasizes form at the expense of substance and fails to follow the admonition of the Supreme Court in *Dickinson* that "§ 36(f) must not be given a restrictive meaning that would frustrate the congressional intent this Court found to be plain in Walker Bank [First National Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252]." The congressional intent referred to in *Walker Bank* was to place national and state banks in a position of "competitive equality" insofar as branch banking is concerned.

Actually, in our view it was not necessary for the trial court in the instant case to find that in permitting withdrawals and transfer of funds, the CBCT fit neatly and precisely into the traditional molds of "checks paid" or "money lent" as those terms are used in 36(f). That section declares that the term "branch" shall *include* any branch place of business where deposits are received or checks paid, or money lent. In this regard the Supreme Court in *Dickinson* commented as follows:

> Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.

In line with the foregoing, then, accepting deposits, or paying checks, or lending money are not the only indicia of branch banking. The typical bank of the present time provides many other services. In this general regard the Supreme Court in *Dickinson* in a footnote at 396 U.S. 134, n.8, quoted the following statement of Representative McFadden concerning the definitional section of the Act:

> Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, *or transacting any business carried on at the main office*, is a branch. (Emphasis added.)

In our view, then, the withdrawal of funds and the transfer of funds from one account to another is a traditional banking transaction which comes well within the prohibition of the statute. And such, we believe, is true regardless of the particular technique used to accomplish the withdrawal or transfer.

Our holding here is in complete accord with the rationale of First National Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252 (1966). There, as above mentioned, the Supreme Court held that the congressional intent behind the provisions of 12 U.S.C. § 36 was to place national and state banks on a basis of "competitive equality" as far as branch banking is concerned. Colorado law on branch banking precludes a state bank from maintaining off premises a machine of the type here sought to be used by the Bank. Accordingly, as concerns the use of off-premises CBCT's, we are by this opinion maintaining competitive equality in Colorado.

There is the suggestion that this is a form of customer service which is to the best interest of the banking public. Such may well be the case. However, this argument should be addressed to the legislative branch of government. The judiciary must apply the statutory law as it has been enacted.

The judgment insofar as it declares the receipt of deposits by the Bank's off-premises CBCT is in violation of 12 U.S.C. § 36 is affirmed. The judgment insofar as it declares the withdrawal of funds or the transfer of funds by the Bank's off-premises CBCT is not in violation of 12 U.S.C. § 36 is reversed. The case is remanded for further proceedings.

APPENDIX C

In The Circuit Court of Cook County, Illinois
County Department, Law Division

No. 76 L 12571

STATE OF ILLINOIS, ex rel., RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies,

Plaintiff,

v.

CITY OF CHICAGO, a Municipal Corporation; JOHN C. MARCIN, City Clerk, City of Chicago; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO; THE FIRST NATIONAL BANK OF CHICAGO,

Defendants.

JUDGMENT ORDER

This cause coming on for a hearing before this Court, all parties being present by counsel and the Court having considered the various motions and memoranda filed by the parties and having heard testimony on behalf of defendants,

THE COURT HEREBY FINDS:

1. That the activities contemplated and included within the "Chicago Financial Services Ordinance" relative to "electronic banking machines" and "community offices" viz:

> "b) "Community Office" means any office maintained by a financial institution separate and apart from its main office, at which office such financial institution
>
> 1) solicits loans for such financial institution

2) gives information about any aspect of its business

3) answers customers' inquiries concerning any business which such customers have with the financial institution, or

4) furnishes advice to customers concerning any of their business with such financial institution.

c) "Electronic Banking Machine" shall mean any mechanical device not operated by a financial institution employee, such as an automatic teller or point of sale terminal by means of which

1) cash or other items may be placed for deposit in any account at such financial institution

2) transfers of funds may be made from one account at such financial institution to another account at such financial institution

3) cash may be withdrawn from any account at such financial institution

4) the proceeds of loans from such financial institutions may be disbursed

5) bills of such financial institutions or of third parties may be paid by debiting any account at such financial institution, or

6) the balance in any account at such financial institution may be ascertained."

are, in fact and in law branch banking under Illinois law;

2. That if the Court had considered and admitted the testimony of all the witnesses presented by the City of Chicago, it would have found that this ordinance would benefit the City and does pertain to its government and affairs;

3. The Court finds that the Constitution of the State of Illinois (Article 13, Section 8) expressly provides that the authority to conduct branch banking may only be granted by an extraordinary vote of the Illinois General Assembly and the "Chicago Financial Services Ordinance" therefore conflicts with this express constitutional provision and is unconstitutional;

4. Having found the ordinance unconstitutional, the Court finds it unnecessary to consider the other objections to the ordinance urged by the plaintiff;

5. There is no genuine issue of fact and plaintiff is entitled to summary judgment as a matter of law;

6. The Court finds that this is a case in which the public interest requires prompt adjudication by the Supreme Court of Illinois.

IT IS THEREFORE ORDERED:

1. That the applications to intervene as defendants of Continental Illinois National Bank and Trust Company of Chicago and the First National Bank of Chicago are granted, plaintiff's objections being of record;

2. That plaintiff's motion to strike the pretrial memorandum of defendants is denied;

3. That the motion of plaintiff to strike the testimony and exhibits is granted;

4. That the motion of plaintiff for summary judgment on the amended complaint as further amended is granted;

5. That the defendants City of Chicago and John C. Marcin and their successors, agents and all persons acting under their supervision are permanently enjoined from in any way placing the "Chicago Financial Services Ordinance" in force and effect and from accepting and otherwise processing notices or applications from financial institutions seeking to open "community offices" and/or "electronic banking machines" pursuant to said ordinance;

6. That the defendants Continental Illinois National Bank and Trust Company of Chicago and the First National Bank of Chicago and their successors, agents and all persons acting under their supervision are permanently enjoined from opening "community offices" and/or "electronic banking machines" pursuant to the "Chicago Financial Services Ordinance" or otherwise acting pursuant to the Chicago Financial Services Ordinance."

_____, 1976

Enter: Judge Raymond K. Berg

Circuit Court Judge

WILLIAM J. SCOTT
Attorney General of Illinois
160 North LaSalle Street
Chicago, Illinois 60601
(Attorney for Plaintiff)

JEROME WEBB
Assistant Attorney General
(Of Counsel)
793-3587